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No. 90-759

# In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. CRAYTON, ET AL., PETITIONERS

*v.*

PRICHARD HOUSING AUTHORITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the owners of lower-income rental housing units were deprived of due process when a local housing authority denied their proposals for subsidies under the Moderate Rehabilitation Program established under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

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### OPINIONS BELOW

The decision of the court of appeals (Pet. App. B) is unreported but is noted at 903 F.2d 829 (Table). The opinion of the district court (Pet. App. D) is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 30, 1990. A rehearing petition was denied on August 3, 1990. Pet. App. C. The petition for a writ of certiorari was filed on October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1978, Congress amended Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, to create the Moderate Rehabilitation Program (MRP). 42 U.S.C. 1437f(e)(2). The MRP "provides a vehicle to upgrade rental properties in their early stages of deterioration and maintain them in a standard condition, while providing rental subsidies on behalf of lower income tenants." 47 Fed. Reg. 34,377 (1982). Under the MRP, the Department of Housing and Urban Development (HUD) distributes funds to local housing authorities, which in turn solicit proposals for the funds from owners of lower-income units in need of rehabilitation. 24 C.F.R. 882.501, 882.503. The selected owners contract with the housing authorities to rehabilitate specific rental units, in return for which the housing authorities guarantee lease payments to the owners on behalf of the tenants chosen for those units for a 15-year period. Pet. App. D, at 5-6.

2. In 1984, HUD provided respondent Prichard Housing Authority (PHA) with MRP funding for 150 rental units. Pet. 7. PHA gave public notice of the availability of these funds and urged interested owners of rental property in the City of Prichard, Alabama, to contact PHA. Pet. App. D, at 5. PHA advised each owner who responded of the requirements for proposals and the criteria it would use to evaluate the proposals. *Ibid.*[1]

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[1] The criteria for evaluating proposals were (1) the amount of rehabilitation to be accomplished; (2) the need for temporary relocation of tenants; (3) whether the unit was occupied by an eligible family; (4) whether substandard housing units were adjacent to standard units; (5) the size of the

In late 1984, petitioners submitted proposals to place approximately 89 of their housing units under the MRP. Pet. App. D, at 6. All of these units were in the Prichard Homes Subdivision of the City. At that time, residents of the Subdivision suffered an imminent health threat from standing sewage and leakage of raw sewage into the Subdivision's water lines. *Ibid.*

PHA made a threshold eligibility determination, eliminating about 250 of the approximately 450 units for which proposals had been submitted. At this stage, all proposals for units in the Prichard Homes Subdivision were eliminated because of the health and safety threat posed by the sewage problems. PHA sent notice of this decision and the basis for it to petitioners and all other applicants with units in the affected area; applicants were also told that they could request a hearing on the decision. Petitioners Clarence Crayton and Edrice Rivers sought and were granted a hearing, at which they argued for reconsideration of PHA's decision; they also submitted their arguments in writing. After the hearing, the Board of Commissioners of PHA denied reconsideration by letter dated June 28, 1985. Pet. App. D, at 7-8; PHA C.A. Br. 10-12.

In August 1986, PHA reclaimed some MRP funds from an owner who died before completing his contractual obligations to PHA. C.A. App. Doc. 7, at 8. PHA used this money to fund four units located in the Prichard Homes Subdivision. *Ibid.* At the time of this decision, the City, HUD, and the Alabama Department of Economic and Community Affairs had entered into a commitment to correct the sewage

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unit; (6) environmental and historic preservation requirements; and (7) the unit's accessibility to the handicapped. PHA C.A. Br. 9.

problems in the Subdivision. *Ibid.* Moreover, an application for a HUD grant to alleviate the sewage problems in this area had been approved. *Ibid.*

3. Petitioners sued PHA, the City, and the federal respondent—the then Manager of HUD's Birmingham, Alabama, office—in the Circuit Court of Mobile County, Alabama, alleging that PHA's denial of their proposals for MRP funds (1) was arbitrary and capricious; (2) constituted inverse condemnation under state law; and (3) violated their rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. Pet. App. D, at 2-3.[2] They sought injunctive and monetary relief. The federal respondent removed the action to the United States District Court for the Southern District of Alabama. After discovery, PHA and the federal respondent moved for summary judgment.

Petitioners moved to amend their complaint to add a claim against PHA based on the state law of fraud and a claim against all of the respondents under the Equal Protection Clause. PHA opposed the motion. The district court never ruled on the motion, and petitioners never sought to obtain a ruling.

The court granted summary judgment in favor of respondents, holding that PHA's decision rejecting petitioners' proposals was not arbitrary or capricious. The court also held that petitioners had no private cause of action under Section 8 of the Housing Act of 1937. The court further held that petitioners lacked standing to assert their due process claims because they had no constitutionally protected property interest in receiving MRP funds. Finally, because petitioners had no property interest in re-

[2] The City was subsequently dismissed from the case by stipulation of the parties.

ceiving MRP funds, the court rejected petitioners' inverse condemnation claim. Pet. App. D, at 1-21.

4. The court of appeals affirmed the district court's judgment without opinion. Pet. App. B.

## ARGUMENT

1. Petitioners renew their contention (Pet. 14-16) that PHA's denial of their proposals for MRP funds violated the Due Process Clauses of the Fifth and Fourteenth Amendments. The courts below correctly rejected that contention.

a. Petitioners' due process claims are based solely on the conduct of PHA. They maintain (Pet. 14) that PHA "deviate[d] from the objective ranking system it developed for administering the [MRP program]." Petitioners do not allege any misconduct by the federal respondent.[3] Thus, petitioners have no colorable due process claim against the federal respondent, because they do not challenge any conduct by the federal respondent to which the injury they allege "fairly can be traced." *Valley Forge*

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[3] Petitioners' complaint contained only the general allegation that "the Defendants" arbitrarily managed the MRP. Compl. para. 7. Petitioners did not allege, either in their complaint or in their motion for summary judgment, that the federal respondent violated any statutes or regulations. Pet. App. D, at 2. Similarly, in unsuccessfully moving to amend their complaint, petitioners alleged only that "HUD is responsible for approving the means and method of administration of the Moderate Rehab program by PHA." C.A. App. Doc. 3, at 5. Petitioners nowhere suggested that HUD breached this responsibility. See 24 C.F.R. 882.501-882.517 (HUD regulations implementing MRP program); cf. *Payne* v. *HUD*, 551 F. Supp. 1113, 1117 (S.D. Ohio 1982) (considering, but rejecting, claim under Administrative Procedure Act that HUD inadequately monitored state's compliance with Section 8 new construction program).

*Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).[4]

b. In any event, the courts below properly rejected petitioners' due process claims with respect to all of the respondents. As the district court recognized, petitioners failed to establish an interest protectable under the Due Process Clauses. See Pet. App. D, at 19-20. Petitioners' interest in receiving funds under the MRP is "an abstract need or desire," not a "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). As such, that interest is not protected under the Due Process Clauses. See, *e.g.*, *Board of Curators* v. *Horowitz*, 435 U.S. 78, 82 (1978) ("To be entitled to the procedural protections of the Fourteenth Amendment, [plaintiff] must * * * demonstrate * * * either a 'liberty' or a 'property' interest.").

That petitioners have established no protectable interest in MRP funds is clear from this Court's decisions addressing due process claims to statutory benefits. *Atkins* v. *Parker*, 472 U.S. 115 (1985) (food stamps); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (disability insurance benefits under Title II of Social Security Act); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (AFDC). Petitioners' claims differ from those asserted in these decisions in three critical respects, each of which is sufficient to defeat petitioners' claims.

First, in contrast to the claimants in *Atkins*, *Mathews*, and *Goldberg*, petitioners are not among

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[4] See also *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.4 & 201 (1989) (finding insufficient "causal connection" between state action and injury complained of to support action under 42 U.S.C. 1983).

the class of persons whom the statutory program at issue was designed to benefit. *Atkins*, 472 U.S. at 117, 128; *Mathews*, 424 U.S. at 332; *Goldberg*, 397 U.S. at 262-263 & n.8. The purpose of the Housing Act of 1937, of which the MRP is a part, is to benefit "families of lower income." 42 U.S.C. 1437. The Act evidences no intent to benefit those who, like petitioners, seek to provide housing to such families. *Moses* v. *Banco Mortgage Co.*, 778 F.2d 267, 271 (5th Cir. 1985).

Second, in contrast to the statutory programs before the Court in *Atkins*, *Mathews*, and *Goldberg*, the MRP is "not * * * a simple entitlement program." *Eidson* v. *Pierce*, 745 F.2d 453, 461 (7th Cir. 1984). Even if, contrary to the district court's holding (Pet. App. D, at 6, 11-12), petitioners satisfied the threshold statutory and regulatory criteria for MRP funds, this did not automatically entitle them to those funds. The MRP statute and regulations afford local housing authorities broad discretion in allocating scarce MRP funds among qualified applicants.[5] Thus, in contrast to the benefits at issue in *Atkins*, *Mathews*, and *Gold-*

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[5] The MRP statute authorizes the Secretary of HUD, with exceptions not applicable here, "to prescribe such terms and conditions for contracts entered into [with owners of lower-income housing] under [the MRP] as the Secretary determines to be necessary and appropriate." 42 U.S.C. 1437f(e)(2). The MRP regulations in turn grant broad discretion to local housing authorities in selecting housing providers for MRP funds, consistent with the statutory policy "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. 1437. See 24 C.F.R. 882.504 (setting forth requirements applicable to selection process); see also 24 C.F.R. 882.401(a) ("PHAs may use the program to achieve local objectives * * *.").

*berg*, MRP funds are *not* "a matter of statutory entitlement for persons qualified to receive them." *Atkins*, 472 U.S. at 128 (quoting *Goldberg*, 397 U.S. at 262); see also *Mathews*, 424 U.S. at 335-339 (describing requirements for disability insurance benefits); cf. *Eidson*, 745 F.2d at 459-462 (in holding that applicants for Section 8 housing have no protectable interest, court relies on owners' discretion to select among applicants who meet statutory and regulatory eligibility requirements).

Finally, petitioners are not challenging the termination of a benefit, but the failure to receive it in the first instance. *Atkins*, *Mathews*, and *Goldberg*, in contrast, involved termination of benefits previously awarded. *Atkins*, 472 U.S. at 128 ("the procedures that are employed in determining whether an individual *may continue to participate* in the [food-stamp] program must comply with the commands of the Constitution") (emphasis added); *Mathews*, 424 U.S. at 332 ("the interest of an individual in *continued receipt* of [disability insurance] benefits is a statutorily created 'property' interest protected by the Fifth Amendment") (emphasis added); *Goldberg*, 397 U.S. at 260 (issue before the Court is "whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of [AFDC] benefits"). While the prior receipt of a benefit as to which one asserts a protectable interest may not be a necessary element of a valid due process claim, it clearly is relevant in assessing whether the interest asserted is merely an "abstract need or desire" (*Roth*, 408 U.S. at 577) or, instead, a "legitimate claim of entitlement" (*ibid.*). The absence of that element in this case significantly undercuts petitioners' due process claims. Cf. *Price* v. *Pierce*, 615

F. Supp. 173, 176-177 (N.D. Ill. 1985) (distinguishing applicants for Section 8 housing from tenants of such housing for purposes of due process analysis), aff'd, 823 F.2d 1114 (7th Cir. 1987), cert. denied, 485 U.S. 960 (1988).

c. Assuming *arguendo* petitioners had a protectable interest in receiving MRP funds, PHA's denial of those funds did not violate the Due Process Clauses.[6] The district court held that PHA's decision was not arbitrary or capricious because it was based on the "imminent health threat" posed by the sewage problems in the Prichard Homes Subdivision, where the units for which petitioners sought MRP funding were located. Pet. App. D, at 6, 11. The court of appeals sustained that holding. The courts below were clearly correct in determining that PHA acted reasonably when it withheld subsidies for housing units located in a hazardous area.[7]

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[6] It is unclear from petitioners' pleadings whether they are asserting a claim under the procedural or the substantive component of the Due Process Clauses, or both, when they argue that PHA acted arbitrarily and capriciously in denying their applications. Compare Plaintiffs Proposed Findings of Fact and Conclusions of Law, C.A. App. Doc. 6, at 8 (stating in proposed conclusion 15 that PHA "violated both substantive and procedural rights * * * under the due process clause of the Fourteenth Amendment") with Pet. C.A. Br. 11-18 (discussing only "procedural safeguards" of due process). As explained in the text, petitioners' claims fall far short of demonstrating an interest entitled to the procedural protections of the Due Process Clauses. Still less do they succeed in establishing that their claims should be reviewed under the doctrine of substantive due process. See *Regents of the Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 228-230 (1985) (Powell, J., concurring).

[7] Petitioners assert (Pet. 14) that PHA's decision to deny their proposals while granting proposals by a former member

d. Finally, petitioners do not, and could not, argue that they were denied adequate procedural protections. Petitioners were notified of the reason their proposals for MRP funds were denied. Pet. App. D, at 6-7. In addition, they were provided an opportunity to argue, both orally and in writing, for reconsideration of PHA's decision. *Id.* at 7-8. Assuming petitioners had a protectable interest in MRP funds, they were afforded at least as much due process as the Constitution requires. See, *e.g.*, *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2250 & n.17 (1990); *Ewing*, 474 U.S. at 220-226; *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985).

2. Petitioners' fact-specific equal protection claim is not properly before this Court. Petitioners argue (Pet. 17, 19-20) that they were denied equal protec-

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of PHA's Board of Commissioners for units in the Prichard Homes Subdivision over a year later was "politically motivated." Petitioners presented no evidence to support this charge. See PHA C.A. Br. 12. In contrast, PHA presented evidence indicating that the subsequent grant of MRP funds followed PHA's recovery of previously awarded funds from an owner who did not fulfill his contract obligations with PHA, and that the later grant was based on (1) the approval of a plan and associated funding to abate the sewage hazard in the Subdivision; and on (2) the fact that the proposals later granted ranked first among those received in response to PHA's initial solicitation for proposals. PHA Mot. for Summary Judgment 7-8, 13-17, Exhs. 7 & 8. For these reasons, the district court was correct in determining that no genuine issue of disputed fact existed regarding the basis for PHA's decision on petitioners' proposals. This determination was sustained by the court of appeals' affirmance of the district court's judgment. Although petitioners here repeat their unsubstantiated charge of political influence, they provide no basis for setting aside the findings below.

tion because: (1) PHA provided MRP funds for units in a subdivision where, petitioners allege, there were health hazards comparable to those in the Prichard Homes Subdivision; (2) a year after denying petitioners' proposals, PHA provided MRP funds to rehabilitate four units in the Prichard Homes Subdivision; and (3) other Section 8 housing programs were operated in the Prichard Homes Subdivision. None of these arguments was set forth in petitioners' complaint. Indeed, the complaint contained no reference to the Equal Protection Clause. As a result, neither the equal protection arguments advanced here nor the factual allegations underlying them were addressed by the courts below.[8] Petitioners provide no reason

[8] Petitioners' equal protection claims were contained in the proposed amended complaint that accompanied petitioners' motion to amend, a motion that PHA opposed. C.A. App. Doc. 3. As indicated, the district court never ruled on this motion, and petitioners never sought to obtain a ruling. In their briefs on appeal, petitioners made passing references to "the concept of equal protection," Pet. C.A. Br. 17, but "emphasized" that their claim was based on their "due process rights under the Fifth and Fourteenth Amendments" (*id.* at 12-13). See also Pet. C.A. Reply Br. 2 ("Plaintiffs now and always have submitted that their primary right to pursue a remedy in the instant action is by virtue of violation of their due process rights * * *."). Respondents' appeal briefs accordingly reflected their understanding that petitioners' assertions of disparate treatment, including their charge of political influence, were made in connection with their claim that PHA acted arbitrarily and capriciously. See Gov't C.A. Br. 15-16; PHA C.A. Br. 19-31. This is therefore not a case in which petitioners' proposed amended complaint would have merely "conformed the pleadings to the 'course of proceedings' " below. Cf. *Ewing*, 474 U.S. at 221 n.6 (granting unopposed motion to amend complaint to add claim against individual defendants not included in original complaint, which named only corporate body, where individuals always "understood the suit to be against them individually, in their official capacity").

why this Court should depart from its settled practice of refusing review under these circumstances. *E.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (where district court denied motion for leave to amend complaint, Court refused to consider claim asserted in proposed amended complaint, since that claim had not been reviewed by either district court or court of appeals).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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